Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1935

In the Supreme Court of the United States

October Term, 1985

ISAAC JOHNSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
GEORGE J. SADD, *Counsel of Record*
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Attorneys for Respondent

JAMES R. WILLIS
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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COUNTER QUESTION OF LAW

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. Whether the trial court erred when it refused to grant Petitioner's motion to suppress.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review the instant matter.

The question herein presented was raised in the Ohio Court of Appeals of Cuyahoga County, and the Supreme Court of Ohio.

The Ohio Court of Appeals, Eighth Judicial District, unanimously affirmed the Petitioner's conviction. Like-

wise, the Supreme Court of Ohio overruled Petitioner's motion for leave to appeal finding no substantial constitutional question.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States and the applicable decisions of this Court. No substantial federal question is presented by the instant Petition for Certiorari.

HISTORY OF THE CASE

Petitioner, Isaac Johnson, appeals the trial court's denial of his motion to suppress evidence. The Court of Appeals, Eighth Judicial District, affirmed the trial court's decision.

STATEMENT OF THE FACTS

The facts relevant to this appeal are as follows. On December 2, 1983, Mary Stewart was arrested for shoplifting by the Cleveland Heights Police Department. While in the Cleveland Heights jail, Stewart agreed to set up a drug buy with the Petitioner in exchange for her release.

Pursuant to that agreement, Stewart called Johnson and allegedly set up a drug buy (The phone call was taped). Stewart was then strip-searched by Officer Donna Long and a recording device was taped to her body. She was also given $200 to make the drug buy. Next, Stewart directed the police to Petitioner's residence, and while the police watched from the car and monitored her conversations, Stewart went into the house. Approximately twenty minutes later, Stewart exited the house with a white

substance later identified as cocaine, and allegedly without the $200. Stewart was taken back to the police station where she was again strip-searched and nothing else was found.

In light of this activity, Detective Pillar submitted an affidavit for a search warrant. Pillar's affidavit described with particularity the residence to be searched, and the contraband believed to be in the home. Pillar, in his affidavit, then proceeded to articulate the facts upon which he based his belief that contraband was located in the home. More specifically, Pillar related the facts of the drug purchase by Mary Stewart, as discussed earlier. Pillar further alleged in his affidavit that the defendant's home was under surveillance for about three hours after the drug buy. During that time, five automobiles pulled into the defendant's driveway with the drivers entering the residence for a period of less than three minutes. Also, during that time, a man fitting the description of the Petitioner left the Petitioner's residence, drove to another home, entered for a few minutes and left with a package. Pillar further alleged, based on his seventeen years of experience as a police officer, that this type of activity is consistent with drug sales.

Based on the aforementioned affidavit, the trial court issued a search warrant for the defendant's residence located at 16189 Northvale Boulevard, East Cleveland, Ohio. A search was conducted on December 3, 1983, at which time various items were seized, including a loaded gun, master number sheets and money.

On January 24, 1984, Isaac Johnson was indicted on one count of possessing criminal tools in violation of Ohio Revised Code §2923.24; one count of having a weapon while under disability in violation of Ohio Revised Code

§2923.13; and one count of violating Ohio Revised Code §2925.03, i.e., selling a controlled substance in an amount less than the minimum bulk amount.

On February 22, 1984, the Petitioner filed a "motion to suppress and for the return of illegally seized property." A hearing on the motion took place on May 2, 1984 and May 3, 1984. At the hearing, Mary Stewart took the stand and testified that she had not had contact with Detective Pillar until the date of the alleged drug buy. She further testified that there was no drug buy, that she had simply faked the drug buy with Petitioner Johnson to gain her release from prison. Stewart stated that she had "fooled" the police by placing cocaine in her vagina prior to the alleged buy. She then went into Johnson's home, had a short discussion, and before leaving removed the cocaine from her vagina and replaced it with the two hundred dollars the police had given her. She also stated that she had not been searched by the police. Petitioner Johnson also took the stand and testified that on the evening of December 2, 1983, people were not coming to his home, staying for a matter of minutes, and then leaving.

Following this testimony, the Petitioner's attorney argued that Stewart and Johnson had established that Pillar's affidavit was riddled with misinformation, and thus, the evidence seized should be suppressed. On May 29, 1984 the defendant's motion to suppress was overruled by the trial court.

On December 20, 1984, the Petitioner entered a plea of no contest to all three counts as charged in the indictment. The trial court found the Petitioner guilty of having a weapon while under a disability, Ohio Revised Code §2923.13 and possessing criminal tools, Ohio Revised Code

§2923.24. The trial court found the defendant not guilty of trafficking in drugs, Ohio Revised Code §2925.03. On December 27, 1984 the defendant was sentenced to a term of two to five years on each of the two convictions.

REASONS FOR DENYING THE WRIT

I. The Trial Court Properly Denied the Petitioner's Motion to Suppress Evidence.

The Petitioner makes two arguments. First, the Petitioner maintains that the testimony at the suppression hearing established that Pillar had intentionally made misstatements and this alone was cause to suppress the evidence. Second, the Petitioner maintains that once the misstatements of facts are deleted from the affidavit, said affidavit did not establish probable cause, and thus the evidence should have been suppressed. These arguments are without merit.

Contrary to the Petitioner's assertions, the testimony of Stewart and Johnson did *not* as a matter of law establish that Pillar had made the numerous misstatements of facts. In *Franks v. Delaware* (1978), 438 U.S. 154, the court expressly stated that a warrant affidavit is presumed valid. *Id.* at 171. The court also held that if a hearing on the affidavit's veracity is had, the Petitioner has the burden of establishing by a preponderance of the evidence the allegation of perjury. *Id.* at 156. The trial court in the case *sub judice* certainly would have been within its discretion to find that the Petitioner failed to maintain his burden. The credibility of both witnesses must be seriously questioned. Mary Stewart's testimony contradicts an earlier sworn statement, and

Johnson's testimony is simply self-serving. Thus, the lower court was not convinced that the Petitioner did in fact establish that there were several misstatements of fact in Pillar's affidavit.

Even if the Petitioner had established that some misstatements of fact did exist in the affidavit, he is incorrect when he states that these misstatements alone, warrant the suppression of evidence. The Petitioner's contention that *United States v. Leon* (1984), 104 S. Ct. 3405, stands for such a proposition was expressly rejected by this court in *State v. Hunt* (Nov. 15, 1984), Cuyahoga App. No. 47941, unreported. In *Hunt*, this court stated as follows:

> While we recognize that the United States Supreme Court recently stated in *United States v. Leon*, (1984) 104 S. Ct. 3405, 3423, that 'suppression is appropriate . . . if the officers were reckless in preparing their affidavit,' we find nothing in *Leon* which indicates that the Supreme Court intended to modify or abandon the standards enounced in *Franks v. Delaware*, (1978) 438 U.S. 154. In fact, the Supreme Court cited *Franks* with approval in *Leon*. *Id.* at 2.

Further, the State does not agree with the Petitioner when he asserts that the appellate court incorrectly interpreted the law in *Hunt*.

In alleging that the *Hunt* decision was erroneously decided, the Petitioner maintains that this court 1) failed to credit the importance of the magistrate's role in the warrant process; 2) forgot that under *Illinois v. Gates*, the reliability of the informant is very relevant; and 3) failed to factor in the compelling idea that only true information should be put into the affidavit. These con-

tentions are without merit. Also, this court has not found, and the Petitioner has not cited, a single case suggesting that *Franks* was overruled by *Leon* or that *Leon* created a separate and distinct reason to suppress evidence.

The Petitioner's second argument is that absent the claimed misstatements the remaining contents of the affidavit lacked probable cause sufficient to support a search warrant. This argument is also without merit. Assuming, *arguendo,* that certain misstatements were made in the affidavit, this court must determine whether, after excision of the false matter, the affidavit is left with sufficient content to establish probable cause. *Franks v. Delaware* (1978), 438 U.S. 154, 156; *State v. Hunt, supra.*

In *Illinois v. Gates* (1983), 103 S. Ct. 2317, the United States Supreme Court set forth the proper test in examining the sufficiency of a warrant affidavit. In abandoning the "two-pronged" test in favor of a "totality of the circumstances" approach, the court held as follows:

> . . . we conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. . . . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth, in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . concluding' that probable cause existed. *Id.* at 2332.

Reviewing the affidavit in light of the "totality of circumstances" approach, and excising all points of disagreement between Pillar's affidavit and Stewart and Johnson's testimony,[1] we would urge this Court to hold that probable cause existed in the affidavit to issue a search warrant.

The undisputed facts in the record include the following:

(1) While in jail Stewart agreed to set up a drug buy with the defendant in exchange for her release;

(2) Stewart called Johnson and set up the drug buy (the call was recorded);

(3) Stewart was given two hundred dollars to make the purchase;

(4) A recording device was placed on Stewart's back;

(5) Stewart directed the police to Johnson's home;

(6) Stewart entered the home and in a monitored conversation a male said that he had "coke";

(7) After approximately twenty minutes Stewart came out of the house with a bag of cocaine and apparently without the two hundred dollars;

(8) Stewart was immediately taken back to the police station where she made a statement relating to the events of the drug buy.

Based solely on these undisputed facts, the trial court was within its discretion in determining that there was a fair probability that contraband would be found in

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1. Since it is not clear from the record which facts the trial court chose to believe, we will assume the trial court made its decision based on the undisputed facts in the affidavit.

the home. The fact that Stewart later testified that she had "fooled" the police by pretending to make a drug buy does not render the search invalid. At the time the affidavit was completed the facts available clearly indicated that a drug buy had taken place. The Petitioner offered no evidence suggesting that the police knew otherwise.

Finally, the Petitioner argues that Criminal Rule 12 (E) requires the trial court to put its "essential findings on the record" as they pertain to the court's determination of the motion to suppress. Ohio Appellate Courts have expressly held, however, that Criminal Rule 12(E) does not require the court to state its findings on the record if the decision involved a question of law. *See, City of Solon v. Mallion* (1983), 10 Ohio App. 3d 130. As noted earlier, the determination that the motion to suppress should be denied could be made as a matter of law. Therefore, the trial court was not required to state its findings on the record.

CONCLUSION

The Respondent submits that the Petition herein fails to present any question of constitutional dimension justifying review by the Court.

The Petition for Writ of Certiorari must, therefore, be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
GEORGE J. SADD, *Counsel of Record*
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Attorneys for Respondent